

To: New Jersey Law Revision Commission
From: John Cannel
Re: Hearsay Evidence in Child Abuse and Neglect Proceedings
Date: September 09, 2019

M E M O R A N D U M

We received two responses to the Tentative Report following its distribution. The first, from Harvey Weissbard, author of the treatise on the Rules of Evidence published by Gann Lawbooks, briefly stated that he can think of no reason to disagree with the position taken in the Report.

The other response, from Gary Mitchell of the Office of Parental Representation, agrees with the change proposed to current law. He disagrees, however, with the changed provision of the Commission's Report on Child Abuse and Neglect in that it would extend the hearsay rule to the new category of "child in need of services". That new category, to the extent that it now exists, is derived from Title 30 rather than Title 9. That derivation means that the hearsay exception would not now apply in that category of cases. So, again, to the extent that "child in need of services" now exists, extending the hearsay rule to that category is a change. However, the "in need of services" category is related to child abuse or neglect rather than to termination of parental rights, the subject of Title 30. A finding of child abuse or neglect requires a finding of fault by the parent, a finding of "in need of services" does not. That is the only real difference between the two. As a result, it does not appear that there is a reason not to extend the hearsay exception to both.

Mr. Mitchell expressed his substantive concerns as follows:

As a general matter, we approve the changes tentatively proposed to conform the Commission's proposed alterations of existing statutes to the decision in N.J. Div. of Child Prot. & Perm. v. T.U.B., 450 N.J. Super. 210 (App. Div. 2017). That decision confirmed that the special evidentiary provisions of N.J.S.A. 9:6-8.46a(4) that would permit admission of child hearsay statements (and permit a court to rely on such statements if corroborated) have application only to cases filed pursuant to Title 9, N.J.S.A. 9:6-8.8 et seq., not to cases brought under Title 30. At present, cases under Title 30 include cases for termination of parental rights, N.J.S.A. 30:4C-15.1 et seq., and for care and supervision pursuant to N.J.S.A. 30:4C-12. Neither existing law nor T.U.B. permits use of the special evidentiary rules in any Title 30 cases.

The Commission's TR notes that its 2014 proposed revision and the existing statute contain similar limiting prefatory language meant to conform to the language on which the T.U.B. decision hinged, namely that these special evidentiary provisions apply to "any hearing under this act," see N.J.S.A. 9:6-8.46a (referring only to Title 9), or as the TR rephrases it to "any hearing under this chapter," namely the proposed chapter 27. But inasmuch as the Commission's 2014 report merged certain parts of Title 30 and Title 9

(particularly N.J.S.A. 30:4C-12), we believe the TR makes inadvertent and unnecessary changes in substantive law and is inconsistent with T.U.B. That change is improper under the Commission's mandate and is inconsistent with its stated intention.

We agree that the proposed change to N.J.S.A. 9:6-8.46 is proper and adheres to the ruling and reasoning in T.U.B. But the proposed amendment to section 9:27-26 of the Commission's 2014 Report goes further and should be changed to conform to the narrower language used in the proposed amendment to N.J.S.A. 9:6-8.46. The broader language proposed as an addition for 9:27-26 would expand application of the special evidentiary provisions now limited to Title 9 cases to include cases that now would be filed under N.J.S.A. 30:4C-12 and which under the provisions of Chapter 27 would be deemed cases involving a "child in need of services."

It is our understanding that the provisions in the proposed Chapter 27, as modeled on N.J.S.A. 30:4C-12, authorize commencement of an action to provide coercive services to families but were only intended to clarify and simplify current law. Yet the changes proposed by the TR to 9:27-26 would expand the State's use of evidence in such cases to be comparable to Title 9 cases and correspondingly would diminish procedural protections for defendant parents and guardians. Expanding what can be considered as evidence in cases now brought under N.J.S.A. 30:4C-12 may have been unintended by the Commission. Regardless, it is inconsistent with current law. For that reason, we believe that to maintain consistency with current substantive and procedural law, the language proposed in the TR for 9:27-26 defining different types of evidence should only refer to any hearing "relating to child abuse and neglect" and not to any hearing relating to a "child in need of services."

We hope these comments will assist the Commission in its undertaking.